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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE BEVERLY REID O'CONNELL, U.S. DISTRICT JUDGE

HUMBERTO DANIEL KLEE and DAVID WALLAK,)
individually, and on behalf of a class)
of similarly situated individuals,)
Plaintiffs,)
vs.) Case No.
NISSAN NORTH AMERICA, INC.,) CV 12-8238 BRO (PJWx)
Defendant.)

REPORTER'S TRANSCRIPT OF
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT
MONDAY, NOVEMBER 18, 2013
10:12 A.M.
LOS ANGELES, CALIFORNIA

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OBJECTOR: ALEX KOZINSKI

1 LOS ANGELES, CALIFORNIA; MONDAY, NOVEMBER 18, 2013

2 10:12 A.M.

3 -oOo-

4 THE COURTROOM DEPUTY: Case No. CV 12-8238 BRO,
5 Humberto Daniel Klee, et al., versus Nissan North America,
6 Incorporated, et al.

7 Counsel, state your appearances, please.

8 MR. LURIE: Good morning, Your Honor. Jordan Lurie,
9 Capstone Law, representing plaintiffs in the class. With me
10 today is Mark Greenstone, Rebecca Labat, Tarek Zohdy, and
11 Cody Padgett, plaintiffs' counsel.

12 THE COURT: Good morning.

13 MR. CAULEY: Good morning, Your Honor. Paul Cauley
14 with Sedgwick on behalf of Nissan. With me today is
15 Paul Riehle, Greg Read, and Anthony Anscombe.

16 THE COURT: All right. Good morning.

17 All right. We're here for apparently -- recently
18 transferred to me, for the fairness hearing and final approval.

19 Are there objectors present in the courtroom?

20 MR. KOZINSKI: Good morning, Your Honor.
21 Alex Kozinski, objector.

22 THE COURT: Good morning, Your Honor.

23 All right. I've read and considered what can only be
24 characterized as lengthy papers and the declarations. It was
25 preliminarily approved by Judge Pregerson, is my understanding,

1 and then he recused himself.

2 But -- and my job under Rule 23 is to independently
3 evaluate the settlement against the claims, listen to the
4 objectors, and determine whether or not this is a fair
5 settlement, given the claims.

6 So I would like to hear from the objector.

7 Judge?

8 MR. KOZINSKI: Good morning. This is made for tall
9 people.

10 THE COURT: Don't I know it.

11 MR. LURIE: Your Honor, can I just raise a
12 preliminary issue with the Court's respect? There -- on behalf
13 of both parties, there are some confidential information that
14 was filed under seal. Also, the extent of the arguments may
15 include confidential settlement discussions. The parties would
16 request that all -- that the hearing be closed and that anyone
17 who's not essential to the proceedings, court personnel, not be
18 included in the courtroom?

19 THE COURT: Well, I don't see anybody -- I see my
20 staff here. I see --

21 MR. KOZINSKI: Two law clerks of mine who are here
22 to watch. I plan to make no reference to any -- Your Honor, I
23 was --

24 THE COURT: I -- I'm going to -- hold on.

25 Sir, you are present in the courtroom. Are you a reporter

1 or something?

2 UNIDENTIFIED MAN: No, ma'am, just an observer.

3 THE COURT: Okay. Well, I am going to ask you to
4 confine yourself to the public record when you're making your
5 statements, and we will take it up after I hear from the
6 objector. Certainly the objector is not then privy to anything
7 filed under seal.

8 MR. LURIE: He is, actually, Your Honor. He signed
9 a protective order allowing him to review the pleadings filed
10 on Saturday by Nissan.

11 THE COURT: Well, I'm sure the judge will know that
12 he is bound by the protective order.

13 MR. KOZINSKI: Your Honor, I'm not a judge this
14 morning. Mr. Kozinski.

15 THE COURT: Okay. Mr. Kozinski, I'm sure you know
16 you're bound by the protective order?

17 MR. KOZINSKI: Yes, I did acknowledge it. I did not
18 tell my law clerks the contents of the protective order.
19 They're here to watch the hearing. I plan to say nothing
20 that --

21 THE COURT: Well, I want to --

22 MR. KOZINSKI: -- refers to anything protected. And
23 I guess counsel can -- can signal if they plan to go into those
24 territories.

25 THE COURT: Here's what's going to happen. If you

1 plan to go into anything under seal, please let me know ahead
2 of time. Okay? I just want to hear from Mr. Kozinski.

3 MR. KOZINSKI: Thank you.

4 Your Honor, I filed -- my wife and I -- incidentally, my
5 wife apologizes, she couldn't be here. She has a brief due
6 before one of your colleagues, and she is busy doing that. So
7 I've been delegated the responsibility of appearing this
8 morning.

9 I just have some points to reiterate that were in my
10 papers and also to respond a little bit to -- to some points
11 raised by Nissan. The basic point is that there can't be a
12 fair settlement here because Nissan has already given away and
13 implemented the warranty.

14 All of us, long before we heard about the settlement or
15 before we got the settlement notice, got a letter in the mail
16 saying you've got an extended warranty. They included a
17 sticker, and here it is (indicating). And they said put it on
18 your warranty book, it extends your warranty.

19 There was no talk of any settlement. There was no talk of
20 any class action. There was no talk of any defeasance or
21 somehow this would be inapplicable if a settlement isn't
22 approved. It's quite unconditional. I checked with my Nissan
23 dealer; it's right there in my record.

24 Now, surprisingly, surprisingly Nissan has not come back
25 and said, oh, it's all provisional, contingent. And people who

1 opt out are going to be denied the coverage, the new coverage.
2 Well, I don't think they can do that, Your Honor. They claim
3 this was valuable consideration. But, of course, they're
4 familiar with the Uniform Commercial Code. And Uniform
5 Commercial Code Section 2-209(1) states quite clearly that the
6 modification of a contract does not need consideration.

7 The Uniform -- that portion of the Uniform Commercial Code
8 has been adopted in California and, so far as I know, in every
9 other state.

10 The Tennessee Supreme Court, which, of course, there are
11 class members in Tennessee, in *Paskell v. Nobility Homes* held
12 it applicable to the purchase of a mobile home, quite analogous
13 to our situation here.

14 So I think they're out of luck. I think they tried to
15 pull a fast one. They tried to persuade the public and the
16 clients and their customers that they were giving away
17 something for nothing. And they went ahead and implemented the
18 warranty.

19 Now, I should make it perfectly clear, I do not think that
20 a class action settlement can't be provisionally implemented
21 before Court approval. And if they said --

22 THE COURT: I agree with you.

23 MR. KOZINSKI: Excuse me?

24 THE COURT: I agree with you.

25 MR. KOZINSKI: Well --

1 THE COURT: It can be provisionally implemented
2 before --

3 MR. KOZINSKI: It can be provisionally implemented.

4 THE COURT: Under Rule 23.

5 MR. KOZINSKI: Exactly. And if that's what they
6 have said, if they had sent letters to the customer saying we
7 are -- we have a settlement in the works, we hope the Court
8 will approve it, we are so acting in good faith that we will
9 start implementing the settlement now and wait for -- not wait
10 for Court approval because we want to be extra fair to our
11 customers, that's fine. They could have done that, but they
12 didn't do that.

13 What they did is they sent out an indefeasible letter.
14 And for them to now stand here and say, oh, we could all pull
15 it back, aside from the fact this would be a public relations
16 disaster, they'd never do it. They cannot do it as a matter of
17 law. The FTC and the State Attorney General would have serious
18 objections to this, I'm quite confident.

19 I also think, Your Honor, that the statement that Nissan
20 makes that objectors are -- I'm sorry, opt -- those who have
21 opted out would be denied benefits if they go to try to get the
22 warranty implemented at the dealers I think is illegal. And
23 this Court should enjoin it.

24 Look at the class action notice and the discussion of the
25 settlement and the discussion of the -- of the -- you know,

1 they make reference to the parallel -- to the parallel letter
2 that people got. And what it says, if you opt out, you don't
3 get the benefits of the settlement. It does not say you will
4 also lose the benefits you got when we sent you a letter and we
5 sent you a sticker to put on your warranty card.

6 And I think it would be unconscionable for this Court to
7 approve a settlement that takes people who read, which is at
8 best an ambiguous notice and I believe one would say a -- far
9 more than ambiguous, it's actually a misleading notice -- and
10 give Nissan the right to pull back because they exercise the
11 right under the class action lawsuit to opt out.

12 Now, of course, Your Honor, I don't represent those
13 people.

14 THE COURT: No.

15 MR. KOZINSKI: Mr. Lurie does, and I would expect
16 for him to stand up and agree with me on this point because
17 these are his clients. But I just point this out, that this is
18 entirely inappropriate for Nissan to even raise in its papers
19 as an argument.

20 So that's my basic argument. My basic argument, there's
21 no settlement possible because there's nothing Nissan has got
22 left to give. If they want a settlement, they've got to go
23 back to the negotiating table and provide more.

24 Now, having said that, let me give full credit to
25 Mr. Lurie and his team. I think they've done a good job. I

1 expressed some skepticism in my papers, particularly in my
2 original papers. I didn't know. I got this notice from Nissan
3 and then I get this class action settlement. To me, it looks
4 like a -- fishy.

5 Well, my wife absolved Mr. Lurie, whom I've talked to this
6 morning. My wife talked to him. And my wife's a good judge of
7 character. She -- she said --

8 THE COURT: I suppose you would say that because she
9 married you, Mr. Kozinski.

10 MR. KOZINSKI: I think I would say despite the fact
11 that she married me --

12 THE COURT: Okay, then.

13 MR. KOZINSKI: -- and has stayed married -- in fact,
14 we -- we were married here -- not here. We were married when
15 my -- before my wife clerked for Judge Pfaelzer here when it
16 was her first year on the bench.

17 THE COURT: Okay.

18 MR. KOZINSKI: So we've been going -- we've been
19 here a long time. We've been together a long time.

20 So that's my basic argument.

21 THE COURT: Okay.

22 MR. KOZINSKI: Getting past that -- and I don't want
23 to burden the Court with too much -- I won't take up too much
24 more time. But I just think the settlement is not fair on its
25 face, even if we get past the question of consideration,

1 whether settlement is possible. We don't know. The only
2 people that have the technical data are Nissan -- is Nissan.
3 They have the data, and they won't share it.

4 Mr. Lurie tried to file a valuation from an expert who had
5 zero information. He had to scour the Internet for what he
6 thinks is the price of a battery. But all the other data, the
7 technical data about how often the battery was replaced, what
8 the cost of replacement, what the cost of repair, all that
9 stuff he has to guess at.

10 Now, that's not -- he's not an engineer expert. He's a
11 valuation expert. Nissan, who has the information, won't even
12 provide enough information to plaintiffs' counsel to be able to
13 make a decent valuation. I think this Court should reject the
14 valuation. It's totally useless. And, frankly, it's like an
15 insult. I think for -- for a valuation expert to come up with
16 something like 38 million or \$200 million and for Mr. Lurie to
17 then say, oh, it's up to \$200 million, I just don't think
18 that's right.

19 Finally, look -- you know, Nissan -- and this will be my
20 last point. Nissan has raised an argument that all this is so
21 difficult and if this case had been tried or had been gone
22 to -- had not settled, this would be so hard to win. And
23 they -- in support of this, I don't know about the Court, but I
24 got two boxes of documents, a foot square weighing about 15
25 pounds this weekend in addition to their submission. And they

1 sort of piled on the papers. But you know what? It gets down
2 to one single document.

3 And I am -- I'm grateful to Mr. Lurie for having reminded
4 me of it because I had read it and I had remembered much of it
5 but I had forgotten that I had one in my file, and that is the
6 disclosure that every single LEAF owner is required to sign --
7 correction, Your Honor -- that I was required to sign and I
8 believe every LEAF owner was required to sign before buying it.

9 So it's quite an unusual document. It's quite unlike
10 anything I've ever done when buying a car. And I actually sat
11 down and read it and memorized parts of it and, in fact, had a
12 copy in my file. I'm glad Mr. Lurie reminded me of its
13 existence.

14 But if you look at this document, it says all sorts of
15 interesting things in it. It does not say -- it talks about
16 having, after five years, 80 percent of initial capacity. It
17 says it's not certain. But it never says mileage counts. It
18 never says the more you drive the car, the more you drive down
19 the battery.

20 Now, Nissan comes back -- and this is in the document they
21 filed yesterday, but I believe this is not confidential because
22 it's a legal argument. They say, oh, it says usage. But usage
23 is not mileage. Usage can encompass any number of things. And
24 we're talking about the Magnuson-Moss Act. We're asking the
25 question: Would this be clear to a reasonable consumer? And I

1 submit to the Court that it would not be very difficult -- it's
2 highly likely that a juror sitting in that box would look at
3 this and say -- when they say usage, a reasonable consumer
4 would not understand mileage, would not understand that the
5 battery would deteriorate with miles.

6 It's an easy case. I think they could win it on summary
7 judgment. But if not for summary judgment, it's a very short
8 and easy trial.

9 I'm putting aside the other claims, the technical claims.
10 They -- they've made claims in the Complaint about -- about the
11 passive cooling system and so on. I don't know anything about
12 those. I don't know anything about this because Nissan
13 provides no information and plaintiffs have not done any
14 discovery. They sat down to negotiate without knowing anything
15 about what's hidden in Nissan's records. But I'm putting all
16 those claims aside. I'm just talking about this document, the
17 one that everybody signed. There is no multiplicity.

18 THE COURT: Well, the one you think everyone signed,
19 the one you know you signed.

20 MR. KOZINSKI: The one I know I signed and the one I
21 believe I've read in the papers.

22 THE COURT: Sure. Okay.

23 MR. KOZINSKI: I believe in the papers they said
24 everybody signed but --

25 THE COURT: Okay.

1 MR. KOZINSKI: I'm assuming everybody. Perhaps they
2 can correct me.

3 But if that is the case, then all the questions about
4 whether the class is a unified class, whether there are
5 circumstances unique to every individual goes away. If this
6 is, in fact, the document that binds the entire class together,
7 this would be a one-day trial. And you know what? I've
8 offered to Mr. Lurie, I can get on that stand. I can be quite
9 persuasive.

10 THE COURT: Okay.

11 MR. KOZINSKI: Unless the Court has further
12 questions --

13 THE COURT: I don't have any further questions of
14 you, Mr. Kozinski. I have some further questions of Mr. Lurie
15 and of Nissan.

16 MR. KOZINSKI: I will take my seat in the audience.

17 THE COURT: Okay. Thank you.

18 First, Mr. Lurie, I want to talk to you because I've read
19 your papers where you tell me this is such a great result.
20 This is a wonderful, exceeds your expectations, blah, blah,
21 blah. And Mr. Kozinski, you know, he raises some points.

22 First of all, you -- you do in your motion for attorneys'
23 fees say you have done some limited discovery. But tell me why
24 this benefits everybody. Tell me why I should -- one judge --
25 and I'm fully aware that one judge has already preliminarily

1 approved this. And this has only come to me quite recently.
2 But my obligation, I believe, is to independently review it.

3 So you can convince me.

4 MR. LURIE: Thank you, Your Honor.

5 I have to say that I'm certainly glad that Mr. Kozinski
6 likes me because I would hate to see what he would say if he
7 didn't like me, given the tenor of the papers and some of our
8 discussions. But I appreciate the time he spent this morning
9 clarifying his position, and I appreciate the opportunity of
10 the Court to clarify our position.

11 Let me step back for a moment, give the Court some
12 context, and then I will respond directly to the points that
13 were raised by -- not only Kozinski objections but all the
14 objectors.

15 This is an outstanding settlement for the class and here's
16 why. We have successfully achieved settlement from Nissan
17 which is a new, unprecedented battery warranty, covers all
18 Nissan LEAFs 2011-2012.

19 THE COURT: No, I understand all of that. I
20 understand that the battery, the nine bars, the inability to
21 drive it, are significantly reduced. But Mr. Kozinski brings
22 up a good point. Nissan immediately sent out a warranty. How
23 is that a settlement at all?

24 MR. LURIE: Nissan sent out that warranty,
25 Your Honor, because we negotiated a settlement that allowed

1 them to do that. I think that this is -- we have to understand
2 and step back a little -- and it's all set forth in the papers,
3 but there's a voluminous amount of material. Let me just step
4 back and give the Court some context on this.

5 When we met with Nissan -- let me step back, actually, to
6 the time we filed the case because it's important. We were
7 cognizant when we filed this case that there was a problem with
8 these cars. We alleged that there was a problem with these
9 cars.

10 THE COURT: No, I mean, you did a lot of pre-filing
11 discovery. I understand you scoured the Internet.

12 MR. LURIE: Well, we did more than scour the
13 Internet, Your Honor, in fairness. We consulted -- we had
14 consultants, we talked to lots of potential plaintiffs, class
15 members, we did a lot of research. But we filed the case.

16 And our understanding of what the issue is here is, as put
17 in the papers and as the parties essentially agree, this
18 battery was losing capacity in an excessive rate. It should
19 have lost 20 percent over five years. It was losing 20 percent
20 over one or two years.

21 Our solution to that problem was to get Nissan to honor
22 the terms, essentially -- more or less to honor the terms of
23 the original warranty, meaning -- not the original warranty --
24 of the original battery capacity, meaning to say if they said
25 it was going to lose 20 percent over five years and it was

1 losing more than that, get it back to that point.

2 We understood at the very beginning of this case that the
3 way to do that was to either extend the warranty or create a
4 new warranty that would protect consumers who were concerned
5 that if they were losing one or two bars within two years,
6 they'd lose a heck of a lot more after five or six years or
7 after three or four years.

8 We came into this case, it was our intention to get the
9 best possible result that we could for the class members. And
10 we understood that the way to do that was to get a new or
11 extended warranty. And it essentially accomplishes exactly
12 that purpose. We pled it in the Complaint, we asked for
13 injunctive relief, and we accomplished it.

14 And the result is excellent because that is essentially
15 what it does. It addresses the excessive capacity loss issue.
16 And that issue is related to driving range, to a certain
17 extent. If you lose less capacity in your battery, you're
18 going to be able to drive less far.

19 We spent two full days negotiating with the defendants to
20 get to that result. We then did additional discovery to
21 confirm that the terms that we had agreed to were the correct
22 terms, that there weren't any other issues in the case that we
23 were giving away.

24 So this is -- and I think the Court has to understand
25 that. What would have happened if we had not settled this case

1 when we did? Let's say that we -- that you overruled the
2 objection --

3 THE COURT: Mr. Kozinski would have testified, as he
4 has volunteered.

5 MR. LURIE: And I look forward to it if we get that
6 far. But we don't need to get that far, Your Honor, because we
7 have conferred an excellent result in this case, and it's a
8 result that should be supported and endorsed. The -- the class
9 members get an outstanding result in this case.

10 Judge Kozinski raises an issue about the June 30 notice.
11 It's very important for the Court to understand that that
12 notice, that June 30 -- the sticker and the part that was
13 attached to the book was sent pursuant to this party
14 settlement. That was a term that Nissan was allowed to do. It
15 was all sent conditioned on the Term Sheet and pursuant to the
16 settlement.

17 When that was sent out, it was entirely consistent with
18 our settlement. It's not as if they willy-nilly turned around
19 and implemented a new warranty. They did it pursuant to our
20 settlement.

21 They can explain best why they didn't say on the bottom
22 this is pursuant to a class action settlement, but they didn't.
23 And that was a business decision that they made. It does not
24 at all take away from the fact that that new warranty was
25 issued pursuant to the settlement.

1 I would also add that -- I know that Judge Kozinski does
2 not agree with this principal, but we have -- we have briefed
3 it in the papers. And if you want, we could -- if the Court
4 would want, we could submit additional material on this issue.
5 That even conceding all the points that Judge Kozinski made
6 about the June 30 warranty, even conceding that and even
7 conceding, which I do not, that the warranty was unconditional,
8 infeasible, and that it couldn't be rescinded, the reality is
9 that Court approval of this settlement guarantees that that
10 can't happen.

11 And Courts have recognized that that is an additional
12 benefit conferred by final approval of a class action
13 settlement, meaning to say tomorrow Judge Kozinski disagrees
14 with this as a matter of law, okay, but let's assume he is not
15 correct. I know that may be a difficult assumption, but let's
16 assume that he's not correct on this point.

17 Nissan today could withdraw that warranty for whatever
18 reason it wanted. It could withdraw it. It could rescind it.
19 It could decide that it's not going to make it for five years.

20 THE COURT: Well, under your argument, they cannot.

21 MR. LURIE: Until -- no. Under my argument, they
22 could. Until --

23 THE COURT: They breach the settlement, yes or no,
24 because that -- you're telling me the reason that motivated
25 Nissan to send that warranty was you.

1 MR. LURIE: Correct.

2 THE COURT: And so if they rescind it tomorrow,
3 they're in breach of the settlement.

4 MR. LURIE: They are in breach of the settlement
5 that was subject to final approval.

6 I'm not sure why this is a difficult concept for
7 Judge Kozinski, and I know that he handles difficult concepts
8 routinely. We have a settlement that's conditioned upon final
9 approval. The steps that were taken between the Term Sheet
10 being signed in December and today's hearing date to finally
11 approve the settlement were all pursuant to that original Term
12 Sheet.

13 THE COURT: Here's the deal. Judge Kozinski is one
14 objector.

15 MR. LURIE: Correct.

16 THE COURT: He is one person.

17 MR. LURIE: Correct.

18 THE COURT: Today he's Mr. Kozinski.

19 MR. LURIE: Right.

20 THE COURT: He could be John Roberts.

21 MR. LURIE: Right.

22 THE COURT: Doesn't matter.

23 MR. LURIE: Right.

24 THE COURT: Today it doesn't matter.

25 MR. LURIE: Right.

1 THE COURT: And most certainly he's not going to
2 hear the appeal. So you need to convince this judge --

3 MR. LURIE: Correct.

4 THE COURT: -- that it's fair.

5 So I don't care whether he knows -- he has difficulty with
6 the concept, in your opinion, or not because I'm the person,
7 that I'm having difficulty with it.

8 MR. LURIE: And I apologize, Your Honor. You're
9 absolutely right, and I appreciate your saying that.

10 So what issues specifically would you like me to address?
11 Because I think I can tell you how great the warranty is. I
12 can tell you what will happen if the warranty -- if the
13 settlement is not approved. Is there a specific -- I can run
14 through the points that Judge Kozinski --

15 THE COURT: I think you should run through the
16 points that the objector made to -- for me to determine whether
17 or not this settlement is fair. And then we're going to get to
18 Nissan, and they're going to have some explaining to do.

19 MR. LURIE: Okay. We've briefed all these issues in
20 the papers, Your Honor, but let me summarize them.

21 With respect to the issue of Nissan already implemented
22 the warranty, that it was infeasible, unconditional, and
23 fully implemented, that is incorrect. It's simply incorrect.
24 It's incorrect as a matter of law for all the reasons that
25 Nissan has briefed in their papers. It's incorrect as a matter

1 of practical -- as a practical matter, it's incorrect.

2 The case law supports the part -- the argument that I was
3 making earlier that the settlement is conditioned. The
4 warranty that was issued in June and pursuant to the original
5 Term Sheet is conditioned upon final approval of this
6 settlement.

7 If the Court doesn't settle it -- if the Court doesn't
8 approve it, Nissan has every right to withdraw it, rescind it,
9 cancel it, or modify it. And that is something that only can
10 happen with final approval.

11 Now, did they send out a letter in June that muddled the
12 waters? Yes, they did. All right. Would they have done it
13 again? I don't think so, because it created a lot of extra
14 problems. But the fact is it was a good thing. It was a good
15 thing because people got the warranty relief offered to them
16 earlier than having to wait for now. And maybe they would have
17 done it earlier. Maybe they would have done it again.

18 The fact is, and the Court has acknowledged, they can
19 issue interim improvements before there's final approval. Why
20 is that any different than what's going on here? That's
21 exactly what's going on here. They issued the warranty, it was
22 subject to final approval of the settlement. It's really no
23 different, when you think about it, than any other case -- and
24 the defendants have cited quite a few of them, and this Court
25 actually approved it in the *Sadowska* case -- where improvements

1 were already ongoing, and the Court granted final approval.

2 If you don't do that, then what you've done effectively is
3 tied the hands of every defendant to say, You know what? If
4 we're going to issue a new warranty, we can't issue it until
5 final approval, which is going to come six months, eight
6 months, ten months, a year from now. There's no value in that.

7 And, frankly, as a plaintiffs' counsel, Your Honor, our
8 goal was to get the best possible relief to the class members
9 as quickly as possible. And we accomplished that.

10 Should the notice have said something else? Should the
11 June letter or the sticker, should it have said something else?
12 Maybe. But that was a decision by Nissan not to include that
13 information. But it doesn't change the fact. The fact is that
14 that warranty was subject to final approval today. And Nissan
15 still has the absolute right to change it, modify it, or
16 rescind it. And it was entirely consistent with our settlement
17 terms.

18 So, frankly, whoever made -- whoever makes the objection,
19 it's an invalid objection.

20 And, frankly, Your Honor, I'm -- I'm curious to know how
21 this would actually play out. Because let's assume -- let's
22 assume that this settlement is not approved and Nissan decides
23 that they are going to withdraw the warranty. Now what
24 happens? Now all the class members who up until this point
25 actually had the benefit of an outstanding warranty now will

1 not have it.

2 That's an unjust result, and it's unfair. And, frankly,
3 it goes against everything that class action settlements stand
4 for. And that is a very real possibility. Will they do it?
5 Who knows. Could they do it? Absolutely. And that's why it's
6 important to have court imprimatur on the settlement. It
7 grants an incredible amount of value to the case and it's
8 undeniable.

9 THE COURT: Let's talk about the litigative risk.
10 It's one of the things I look at.

11 MR. LURIE: Uh-huh.

12 THE COURT: How do you have any litigative risk
13 here?

14 MR. LURIE: How did we have before we settled?

15 THE COURT: Yes.

16 MR. LURIE: When we pled the case, Your Honor, we
17 pled the -- the fact, essentially, that the battery had a -- it
18 was defective in a sense that it was losing capacity in an
19 excessive rate. To bolster those allegations, we also alleged
20 other things; had to do with driving range, other -- other
21 complaints about battery charging incapacity.

22 Those were all in the context -- and if you read the
23 Complaint carefully -- they were all in the context of our
24 allegation that the battery was losing excessive capacity. All
25 right? Really wasn't a stand-alone claim.

1 Nissan said you could drive 100 miles on a fully charged
2 battery and, therefore, Nissan lied. If you read the Complaint
3 carefully, that's not what it said. Right? It was in the
4 context of the excessive battery capacity. But even if you did
5 read the Complaint that way -- and I'll grant, certain
6 objectors did read it that way and one could read it that way.

7 Even if that were the case, what happened was after we had
8 our settlement discussion with Nissan, they pointed out to us
9 that those claims, in fact, were meritless -- or were of very
10 little merit. And we did the discovery necessary to figure out
11 if that was true, independently and in using the documents that
12 were produced by Nissan.

13 We evaluated each complaint that was made in the
14 Complaint -- each allegation that was in the Complaint. And we
15 came to the conclusion that, on balance, those claims did not
16 have merit or enough merit not to accept a warranty that they
17 were offering today, which was outstanding and which would take
18 care of plaintiffs today.

19 And as I stand here today, Your Honor, telling you, those
20 claims, in our mind, are not worth sacrificing the warranty
21 that the class got as a result of this settlement. And I can
22 tell you specifically what the problems were.

23 The defendants, unfortunately, did a very generous job of
24 kind of raining on our -- on our allegations, which is, I
25 guess, their job. But the truth is, Your Honor, that the only

1 allegation or the allegation that had the most strength in this
2 case was the battery -- excessive capacity battery claim.
3 Okay. The rest of the claims simply did not have sufficient
4 merit to prosecute them.

5 For example -- and I -- I'm actually glad that
6 Judge Kozinski referenced the -- the disclosure form. Okay.
7 There are a lot of very educated consumers who buy Nissan LEAF.
8 Almost all of them realized, however, that this is technology
9 that's on the cutting edge. That's probably why Nissan has a
10 five-page disclosure, because this is not exactly like driving
11 a regular car or even like charging your phone. It's
12 completely different.

13 They disclose -- they go to great lengths to disclose
14 exactly what the risks are when you buy this car, how do you
15 use it and how not to use it.

16 We evaluated that pretty carefully. And, frankly,
17 Your Honor, I would encourage you to do it if you're so
18 inclined. If you read that disclosure form and the other
19 documents that were submitted as exhibits to my declaration and
20 as exhibits to Nissan's papers, it is very hard to argue that
21 we should have taken this case to trial on those disclosure
22 issues and expected to win and sacrificed a warranty that we
23 had in place immediately benefiting class members, an
24 unprecedented warranty that would last for five years, replace
25 or repair the battery.

1 And here, Your Honor, there is information with respect to
2 the confidential information that was submitted, which I would
3 refer to if there weren't other people in the room because it
4 is trade secret information.

5 THE COURT: No, I will -- I will reread your
6 confidential submissions. So --

7 MR. LURIE: Okay. So it was an outstanding
8 warranty, and there was simply no reason to pursue those other
9 claims.

10 Now, objectors may contend, sure, the Magnuson-Moss claim,
11 that was obvious. But it's not an obvious claim, Your Honor.
12 It's simply not. You haven't satisfied the other requirements
13 of consent, assent, mutual agreement. We don't believe those
14 were there.

15 But even if they were there, even if they were there,
16 should we have prosecuted that claim, which had its risk -- we
17 certainly could lose. And if Judge Kozinski is right and this
18 is a Ninth Circuit issue, we certainly -- it's certainly not a
19 well settled issue of law. We should have traded that claim
20 and the risk of losing that claim, the risk of not certifying a
21 class, which is not small, the risk that we would never get a
22 nationwide class, which we got in this settlement because we
23 had only pled a California case and -- class and Arizona class.
24 So we achieved a nationwide settlement. But we should have
25 sacrificed all that in the interest of pursuing a claim that

1 was questionable.

2 As a plaintiffs' counsel standing here, I would not -- I
3 did not make that decision. In fact, I would not make it -- I
4 would make the same decision again. Because when you settle a
5 case, you have to evaluate what are the relative merits and
6 negative characteristics of the case.

7 When we pled it, we pled it one way. Discovery confirmed
8 for us that the only legitimate claim worth settling in this
9 case was the excessive capacity claim.

10 The other claims that Judge -- that objectors in general
11 make is this claim about charging the battery to 100 percent;
12 that if you charge it to full capacity, it's poison. Frankly,
13 Your Honor, we looked at the disclosures, it's simply not true.
14 Nissan didn't say it. It was misconstrued.

15 Now, very intelligent people can read those disclosures
16 and reach different conclusions; there's no doubt about that.
17 But there are a lot of class members who read those disclosures
18 who thought our lawsuit was bogus. There were class members
19 who thought we never should have filed this because it was
20 obvious what Nissan had said and our claims had no merit
21 whatsoever. They couldn't even understand why we had filed a
22 lawsuit.

23 So for as many people as the objectors here in the
24 courtroom who might think that these disclosures were
25 misleading, there are an equal, if not more, number, a larger

1 number who think that those disclosures were perfectly clear.
2 And usage means driving and not charging means not charging,
3 and there weren't any ambiguities in this issue.

4 So when we had to balance the relative merits of the
5 claims and decide which claims we should prosecute, we made the
6 decision that it was worth settling. It was not even worth
7 settling, it was an outstanding -- outstanding settlement
8 because we got the plaintiffs, the class members what they
9 needed right away on a nationwide basis.

10 Let me just touch on two other issues quickly, if you'd
11 like.

12 THE COURT: Go ahead.

13 MR. LURIE: With respect to the opt-out issue,
14 Judge Kozinski, the objectors, other objectors made an issue
15 about, you know, how legitimate are these opt-outs.

16 Your Honor, the class notice that went out is perfectly
17 clear. If you participate in the settlement, you get the
18 warranty. If you don't, you don't.

19 The objectors wanted to know is there proof of that. How
20 do we know that? Nissan submitted a declaration, and they said
21 that. If you opt out, you do not get the warranty. You're on
22 the list. You're on their hit list. They will check it out
23 when you come in. And if you're not on there, they have the
24 option not to give you that warranty. You are not covered.

25 THE COURT: So even if they have a sticker --

1 because presumably they've already sent out this sua sponte,
2 according to you, subject to your settlement agreement,
3 sticker, which was shown to me today. Then if the person with
4 the sticker opts out, they get on the naughty list as opposed
5 to the nice list, and they go to Nissan to get their battery
6 because it's less than nine bars and they want to be able to
7 drive more than 75 miles, Nissan says, Nope, you're out.

8 MR. LURIE: Nissan can say, Nope, you're out, yes.
9 Will they say it? I don't know. I don't work for Nissan.
10 Does anybody sitting at that table know if they're going to say
11 it? I don't know. They're not the dealer. The reality is
12 they absolutely have that option. And if they want to, they
13 absolutely can.

14 But when you approve the settlement today, they absolutely
15 can't. Because when you approve the settlement, everybody
16 who -- the settlement will actually -- the settlement will
17 endorse all the settlement claims. I misspoke. I was
18 confusing the issues.

19 THE COURT: Okay.

20 MR. LURIE: Sorry about that, Your Honor.

21 THE COURT: I'm ready to --

22 MR. LURIE: I got a little excited, Your Honor. I
23 withdraw that. I withdraw that. I withdraw that.

24 THE COURT: Okay.

25 MR. LURIE: Strike that. Okay.

1 The reality is that is what Nissan has confirmed in
2 writing. Judge Kozinski wanted to see it, we gave it to him.

3 I'm not sure what more we can do to convince the Court
4 that exactly what we said happens and that we got the result
5 that is outstanding in the class.

6 With respect to the discovery issue, you know, frankly,
7 Your Honor, we put it in the papers. There was plenty of
8 discovery in this case. And I think the really important
9 issue -- I'm trying not to take it personally, but it is a
10 personal thing. It's a little -- frankly, it's a little --
11 more than a little bit insulting.

12 I mean, we did a tremendous amount of work in this case
13 before, during, and after. Frankly, we still are. We're still
14 dealing with plaintiffs in the case, class members. We did an
15 outstanding -- an incredible amount of discovery to confirm
16 that our allegations were correct before we filed them. We did
17 a tremendous amount of discovery afterwards to confirm that the
18 settlement was fair, adequate, and reasonable. And again, I
19 would just add parenthetically, something this Court already
20 knows, it doesn't have to be a perfect settlement. It has to
21 be fair, adequate, and reasonable.

22 Could it be better? Any settlement could be better.
23 Could we have gotten 100,000 miles? No, we couldn't, because
24 we negotiated for that and we didn't get it. Did we get the
25 best settlement we could get under the circumstances? I have

1 no doubt about that, and there's no doubt for that reason that
2 the settlement should be approved. We did the best -- we got
3 the best possible result in this case.

4 And with respect to the discovery, I think it's
5 important -- you know, certain objectors think that it's the
6 goal of a litigation to shake up the company, to shine light
7 into all the hidden recesses of the company, dig out all the
8 bad stuff and, you know, shining the light of day. Sometimes
9 you need to do that in a case; sometimes you don't. And in
10 this particular case, we did not.

11 Defendants agreed with us at the beginning, we are -- the
12 goal at the beginning was to get the benefit to the class as
13 soon as possible.

14 Frankly, Your Honor, it doesn't matter to us what the
15 cause is of the battery -- the excessive battery capacity
16 defect. It doesn't matter. You know why? Because the
17 warranty covers it. The warranty covers it 100 percent.
18 Regardless of the cause, regardless of the reason, they're
19 guaranteeing this battery. It's not important to us. And,
20 frankly, it wasn't worth two more years of litigation to find
21 that out so that the class wouldn't have a benefit right away.
22 Simply wasn't.

23 And I'd stand by that decision again and I stand by it now
24 and I would stand by it in the future.

25 THE COURT: Let me say, Mr. Lurie, my -- my intent

1 is not to insult you in any way. My intent is to -- with very
2 short notice, not having presided over any of the preliminary
3 matters in this case, to figure out whether or not the
4 settlement is fair and reasonable independently.

5 MR. LURIE: No. I appreciate that. The insulting
6 comment was really to the papers that had been filed, not --
7 certainly not to this Court.

8 THE COURT: All right.

9 MR. LURIE: Certainly not.

10 THE COURT: Anything else you feel like you want to
11 explain to me before I hear from Nissan?

12 MR. LURIE: I'm sure I have a lot to explain,
13 Your Honor, because I think -- I feel strongly that this is a
14 settlement that should be approved despite some of the
15 objections that have been raised. I would appreciate the
16 opportunity after Nissan speaks to cover any additional points
17 that the Court has with respect to this settlement or with
18 respect to the fee.

19 I very much respect the objectors, and we did -- we took
20 our responsibility seriously as class counsel. We met with
21 them in person, and they're not the only ones.

22 THE COURT: No, no. I've read the -- the list of
23 objectors, and some were -- some opted out for certain reasons
24 and some did not.

25 MR. LURIE: Right. So we take it seriously, and we

1 respect everyone who brings an objection. You don't have to be
2 a jurist, a lawyer. We spoke to everybody.

3 But the bottom line here, Your Honor, is we have one
4 objector -- we have one significant -- we have ten objectors.
5 We have one vocal, serious objector. He's not happy with his
6 car. I appreciate that. I really do. But it's not a reason
7 not to confirm the settlement.

8 Thank you.

9 THE COURT: All right. Thank you. I'll give you
10 time to respond.

11 MR. LURIE: Thank you.

12 THE COURT: Nissan.

13 MR. CAULEY: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. CAULEY: I -- I certainly would first like to
16 talk about the value of the settlement and why we certainly
17 consider it valuable, important consideration for the class.

18 THE COURT: Let's talk about the value of the
19 settlement for a second because the valuation expert from the
20 plaintiff has a wide breadth of value, 38 million to
21 200 million, \$11,000 per person.

22 So how can that value possibly be estimated with no
23 information?

24 MR. CAULEY: Your Honor, I --

25 THE COURT: And then we're going to get into whether

1 or not there was any consideration for this.

2 MR. CAULEY: We certainly would agree with you that
3 plaintiffs asked us for a valuation. I will tell you that the
4 cost of these batteries and the value of these batteries is
5 highly proprietary information. They are not cheap.

6 We knew the plaintiffs would need some valuation on this.
7 I mean, we're cutting-edge. It's a brand-new technology. Big
8 TVs and computers were awfully expensive, and the cost comes
9 down and down. We're the first one out there. All I can say
10 is I know they're incredibly expensive. It's proprietary.

11 But we knew the plaintiff and we knew the Court needed
12 some assurance of the minimum value of what it would be. And
13 so after having discussions with Mr. Lurie, appreciating
14 that -- that you would need information and he would need
15 information, we talked to the business about providing under
16 oath some assurance about a minimum value. It may, in fact, be
17 well above that.

18 But it is proprietary. And just frankly, Your Honor, for
19 business and other competitive reasons, we simply did not want
20 to get into that. But we knew you needed assurance that there
21 was a minimum value.

22 I can't comment on the report of their expert. All I can
23 comment on is the declaration we provided and that it's a
24 minimum of 10 million.

25 THE COURT: Okay.

1 MR. CAULEY: Your Honor, if I may -- do you have
2 another question about that? If I may, I had a chart I wanted
3 to show you.

4 THE COURT: Show it to Mr. Lurie first, then my
5 courtroom deputy will pick it up.

6 MR. KOZINSKI: Can I see one?

7 MR. CAULEY: Your Honor, I'm going to give one to --

8 THE COURT: You may.

9 MR. CAULEY: Your Honor, this -- as everyone has
10 said, this is -- it is incredibly new technology. Nissan was
11 the first to have one of these affordable vehicles. It wants
12 it to succeed. Customer satisfaction was important. Resolving
13 this lawsuit was important.

14 And if the -- the green at the top is put in there to
15 really point out that this really is a new warranty. It was
16 the first of its kind. I'm still not aware of any battery
17 capacity warranty that's out there. When the car was sold as
18 new, it came like every other car, with a defects and materials
19 and workmanship warranty. If there is a defect, it will be
20 repaired within the warranty limits.

21 Specifically, as shown at the bottom of the green area,
22 "Loss of battery capacity due to or resulting from gradual
23 capacity loss is not covered under this warranty." So when
24 these vehicles were purchased, while there was a warranty
25 against defects in the battery, there was not a warranty about

1 performance. This is essentially a performance warranty.

2 It's going to -- regardless of whether the battery is
3 performing in Arizona in 120 degrees temperature with somebody
4 driving 40,000 miles a year, regardless of whether it's
5 performing exactly like lithium-ion batteries do, we're still
6 going to repair that vehicle. So it's a performance assurance.
7 Frankly, it's a performance assurance that Nissan wanted to
8 provide to its customers and Mr. Lurie wanted to provide to the
9 class members.

10 So this really is unique. So when you look at the
11 additional coverage, we provided something that was actually
12 excluded and not covered in the warranty at the time these
13 vehicles were sold.

14 I think that's quite significant and unique, that we've
15 given you a list of lots of cases where warranties were
16 extended for longer times and longer mileages as part of class
17 action settlements. This actually is something that's brand
18 new and was provided. So I think that -- I think that is an
19 important point about the value.

20 The other thing that I think dovetails with some of the
21 questions about confirmatory discovery and things of that
22 nature, you know, we didn't offer a coupon. We didn't offer
23 \$50 toward a repair. We didn't offer a repair with a
24 deductible. We basically offered something that didn't exist,
25 and it's essentially a guarantee. We take the risk.

1 THE COURT: Unconditional.

2 MR. CAULEY: I'm sorry. It's a -- yes, it's an
3 unconditional guarantee if you have the warranty. If you fall
4 below those nine bars, we're going to get you back -- we're
5 going to get you back to nine bars even if you've had this
6 battery four or five years.

7 I -- I think that is -- I think that is important because
8 we're taking the risk. We're saying we don't think this is a
9 big problem, candidly, Your Honor. We think it is -- and as
10 we've said publicly a number of times, we think that it is an
11 issue that's focused in the desert southwest, primarily Arizona
12 and a few other very hot states.

13 THE COURT: California being one of them.

14 MR. CAULEY: Well --

15 THE COURT: Not today.

16 MR. CAULEY: Not Los Angeles, but --

17 THE COURT: Palm Springs is pretty hot.

18 MR. CAULEY: Palm Springs is. We think -- and I
19 think the folks in Palm Springs would be upset with me lumping
20 that together with -- with Arizona, but it is the desert
21 southwest. They're both very hot places.

22 We think it is a small issue. But if we're right, the
23 class is still getting a benefit and the cost will not be as
24 great to us. If we're wrong, it's going to be really expensive
25 for us. But the risk is ours, and it's not the class's.

1 And so not only have we come up with something that never
2 existed before and, to my knowledge, still doesn't with any of
3 the other electric vehicles -- and you combine that with the
4 risk being all on us, I see that as -- I think that is
5 significant consideration for -- for the class and frankly
6 consistent -- you know, significant consideration and assurance
7 for our customers because we wanted the customers to know we
8 believe in the battery. And if you have the capacity loss that
9 you're concerned about having and it slips down to this point,
10 you're going to get protection.

11 THE COURT: Let's talk about the argument for a
12 moment about your unilateral giving of this warranty. You sent
13 everybody a sticker. And 2013 had modifications; 2011-2012 you
14 sent the stickers. And how is that in lacking -- how does that
15 not lack consideration for the settlement?

16 MR. CAULEY: Your Honor, it frankly wasn't
17 unilateral.

18 THE COURT: Okay.

19 MR. CAULEY: It was -- and I will -- I'm going to
20 walk through it.

21 THE COURT: Okay.

22 MR. CAULEY: In fact, can I do another chart to
23 address that issue?

24 THE COURT: You most certainly may.

25 MR. CAULEY: All right.

1 Your Honor, if I may, I -- that is a -- that's a pretty
2 easier to understand version. I have a more detailed one that,
3 I think, in fairness should be given too so it's not just so
4 abbreviated.

5 THE COURT: Okay.

6 MR. CAULEY: Your Honor, we've cited a number, I
7 think, of cases in our briefing that consideration is judged
8 at -- at the time of the formation of the contract.

9 Here's -- here's what we did. And I believe all the
10 communications make sense, and I believe there's a very good
11 reason why the June communication did not look anything like
12 the class settlement notice. And I can walk through those.

13 THE COURT: Please do.

14 MR. CAULEY: First, we -- right after we negotiate
15 for two days, we enter into a Term Sheet. The Term Sheet is
16 December the 5th. The Term Sheet, which is an exhibit to
17 Mr. Menges's deposition, specifically contemplates that. As
18 Mr. Lurie has indicated to you, he was interested in getting
19 relief to the class quickly. Frankly, Nissan was interested in
20 getting relief to the class quickly.

21 So we specifically contemplated that Nissan was going to,
22 in very short order, make a public announcement about the
23 warranty applying to 2011 and 2012 vehicles and would
24 specifically indicate that that announcement was a part of our
25 efforts to address customer concerns, including those of the

1 plaintiffs in this lawsuit.

2 Now, that forum of the entire electric vehicle community
3 is quite different. These are forward-thinking people. These
4 are generally sophisticated new innovators. They're willing to
5 take a chance on new technology because they believe in it.
6 They communicate on forums all the time. You'll see in the
7 records information on mynissanleaf.com. It's not our forum.
8 It's a forum for owners, but it's a way that Nissan regularly
9 communicates. It's just the way that things are now.

10 And so that was the venue. We had previously communicated
11 the -- the Carla Bailo open letters from July and September had
12 gone on the Nissan -- on that forum. So Andy Palmer, a high-up
13 executive at Nissan, went on the forum to announce that there
14 was going to be a warranty. The Q and A, as part of that post,
15 contained the exact language that we had discussed with
16 Mr. Lurie, indicating that it was part of -- it was part of the
17 effort to settle the lawsuit and to address customer concerns.

18 But the Palmer letter -- the Palmer announcement went even
19 further. It said we don't have the terms of the warranty yet,
20 the one I've just announced to you and talked to you about.

21 We think that's going to be coming out in the -- toward
22 the spring of 2013. That's when -- pursuant to this new
23 announcement that did reference the class action lawsuit,
24 that's when we're going to be announcing the specific terms.

25 We didn't get it done by -- well, the announcement to the

1 dealers went out at the very end of the spring. I think it was
2 May the 30th. We barely made it, announcing the warranty.

3 So, in other words, just like we had said following the
4 Term Sheet, just like we indicated in the announcement of late
5 December, we -- Nissan then went out with the announcement of
6 the warranty once the specific terms were in place. It takes a
7 delay. This is indicated in the materials. We didn't have the
8 capacity to take care of these repairs at that time, and that's
9 normal. You've got to build up the capacity to get repairs
10 done.

11 So we said the announcement is going to be spring of 2013.
12 We, in fact, announced it to the dealers spring of 2013. We
13 announced it to the consumers June of 2013.

14 In the letter that we sent out, I think in the first
15 paragraph, first or second paragraph somewhere near the top it
16 specifically says, "As we announced to you back in December" --
17 that announcement, which came right after and pursuant to the
18 settlement agreement, "as we announced to you back in December,
19 here are going to be the terms of this warranty." Clearly we
20 implemented it before we had final approval, as -- I think
21 we've given you a number of examples of other cases where that
22 has been done.

23 We did not -- and I think, Your Honor, upon reflection, it
24 would not make sense for us to do it because we know a class
25 notice is coming. There's a lot of body of law out there and a

1 lot of guidance that the class notice needs to be clear. It
2 can't be confusing. It can't make people wonder, well, what
3 are these letters we're getting?

4 If we had discussed the class action, even talked about
5 opt-outs, opt-ins, et cetera, before we even had preliminary
6 approval, we now run the risk that here's some unilateral
7 letter on our part that's going -- that may be confused by some
8 people to look like the class notice, and we'd be criticized
9 later.

10 The logic of all the communications made sense. The June
11 letter tied back to everything we had said before, but we knew
12 we couldn't -- this could not look like a class notice or it
13 would undermine the effectiveness of the class notice that went
14 out, or some could say that.

15 And so, you know, I wish that everything in life I did I
16 didn't have to look back on and say, Gee, could I have been a
17 little clearer or could I have done something different? Could
18 my client have done something different? But I think if you
19 look at the chronology and you look at the communications, you
20 can see that the effort in -- and intent was to have all of the
21 communications in sequence make sense. Every communication was
22 exactly what we told them we were going to do at each step of
23 the way.

24 So it all ties back to the original Term Sheet,
25 Your Honor, and that's the time consideration is judged.

1 And we -- you know, obviously we were hopeful there would
2 be final approval. We thought this was a terrific deal for our
3 customers. Mr. Lurie felt it was a terrific deal for Nissan
4 LEAF customers because it was a performance guarantee. And
5 it -- candidly, Nissan knew it was taking the risk to go out
6 there and offer that warranty at the time because you might not
7 approve it. And we recognize that. We -- we hope you will.
8 We hope you will because we think it is good for our customers
9 and we think it's good for the class.

10 THE COURT: So tell me about the opt-out procedure.
11 If you've already sent these stickers, is the way that
12 Mr. Lurie explained it accurate, that there is a sticker on
13 someone's warranty book, whatever it is, they go to the Nissan
14 dealership -- they opted out, they go to the Nissan dealership
15 and say I have seven bars. I want nine. And what -- what does
16 Nissan do then? They have the ability to deny it?

17 MR. CAULEY: They have -- they have the ability to
18 deny it. They have lots of things they can do. Those people
19 specifically -- in my view, specifically had a notice that said
20 if you opt out, you don't get the benefit and chose to opt out.

21 Would we -- and, frankly, it's hypothetical and
22 speculation on my part. But would -- would Nissan let those
23 people opt back in and get the coverage and sign a release?
24 They sure might do that.

25 When you opt out, now you're back in the position of a

1 litigant. You're back -- you haven't released anything.
2 You're back in the position of a litigant. You may sue us. We
3 may have to defend it. We don't want to do that. We don't
4 want unhappy customers. I hope if they come to me, if they
5 come to a Nissan dealer and they say, you know, I didn't think
6 I was going to need this or I didn't really appreciate
7 everything, what will you do for me?

8 Nissan's in the business to have happy customers, not
9 upset customers. You know, if there's a way to make it work to
10 let them opt back in in exchange for a release or -- do what we
11 do with unhappy customers all the time, but it's going to have
12 to be done on a case-by-case basis because, you know, true to
13 the notice of the -- the entitlement to a warranty was provided
14 by the class settlement.

15 And so the procedure is in place, and it needs to be
16 because that's what the class notice said and we've got to
17 honor the class notice. But does that mean it's the end of the
18 road for those folks? No. All I know is they're litigants and
19 we'll have to deal with them as litigants.

20 THE COURT: They can litigate as well.

21 All right. Anything else you wish to explain to me,
22 Counsel?

23 MR. CAULEY: Your Honor, if I may just check my
24 notes real quick.

25 THE COURT: Sure.

1 MR. CAULEY: I think I only want to address the --
2 the usage comment in the Magnuson-Moss argument, if I could.

3 THE COURT: Okay.

4 MR. CAULEY: Magnuson-Moss just deals with
5 warranties. It says -- it says warranties have to meet certain
6 requirements. It's -- you know, it's a written promise made in
7 connection with the sale of a consumer product. And it says if
8 you do that, there are certain requirements. You can't -- you
9 can't do trick evade warranties. You've got to be clear. If
10 they're limited, you've got to say they're limited. You --
11 if -- you've got to put that information in a clear form for
12 consumers. That's really what it deals with.

13 Number one, this disclosure is not a warranty. It is a
14 disclosure, an unprecedented disclosure at that, but it still
15 is a disclosure. But more importantly, just to address the
16 factual argument, Your Honor, the chart I gave you, the one on
17 the warranties shows that we've got all kinds of warranties on
18 this vehicle.

19 Some are based on -- some -- seat belts are lifetime.
20 There is no limit on seat belts. That's common, I think,
21 for -- for all Nissan vehicles. The basic warranty, 36 months
22 or 36,000 miles, time and usage. Power train, 60 months and
23 60,000 miles. A lithium-ion battery -- and I think it says it
24 in the disclosure, it says it in the owner's manual, it says it
25 all over the place. You know, batteries can lose power,

1 candidly, sitting there. The battery in your flashlight may
2 not work if you haven't used the flashlight for three years.

3 Lithium-ion batteries are the same way. If you don't even
4 use your battery, just the passage of time is going to reduce
5 your capacity somewhat. Certainly the more you use your
6 lithium-ion battery, the -- the more usage you give to it --
7 just like the rest of your car, the more usage you put to it,
8 the less time it's going to last and the more capacity it's
9 going to lose.

10 And that -- you know, you give a disclosure, you think
11 it's clear as can be, and then somebody reads it in a way you
12 never intended, and so the next time you try to make -- you try
13 to make the disclosure more clear.

14 But we clearly said it -- with age, because we're trying
15 to communicate, even if you don't use it, you're going to lose
16 some capacity. But also, your driving habits and your usage
17 are going to cause the capacity to go down.

18 We provided an estimate. It is, as I understand it -- and
19 I think, as we've said a number of times publicly, it's not a
20 flat line. It's -- it's more of a curve line, so you lose a
21 little bit more capacity in the first few years, then it starts
22 to flatten out. That's why the estimates were 80 percent after
23 five years and 70 percent after ten years. You can see that's
24 not a flat line. That started -- it's not a straight line.
25 It's starting to flatten out.

1 You know, we're trying to communicate that. But the
2 battery's no different than any other component. It's going to
3 wear with usage, it's going to wear with time, and that's why
4 we say -- we mentioned both age and usage in our one paragraph
5 disclosure about battery capacity.

6 And so I -- I think it was as clear as can be. I don't
7 think the Magnuson-Moss Act even applies to that disclosure.
8 But even if it did, certainly in evaluating the merits of the
9 case and the risk that the class faced, that has to be taken
10 into consideration.

11 I'm happy to answer any other questions you may have, but
12 I'll sit down for now if you don't have any at this time.

13 THE COURT: I don't have any further questions for
14 you, Counsel. Thank you.

15 Mr. Lurie, you can close it out.

16 MR. LURIE: Thank you, Your Honor. Just a few
17 points.

18 I would just stress that, as this Court is aware, the
19 standard for approving a settlement is whether it's fair,
20 adequate, and reasonable, not whether it's perfect and not
21 whether it could be better under other circumstances.

22 There should be no doubt to the Court that this is a fair,
23 adequate, and reasonable settlement despite the objections
24 because we have refuted every point that's been raised.

25 With respect to the consideration argument and the June

1 letter, I think we've explained it. If the Court has any
2 questions about any of these issues, we'll be happy to answer
3 them.

4 The fact that there could have been additional terms of
5 the warranty, it could have been 100,000 miles, it couldn't.
6 We negotiated the best possible warranty under the
7 circumstances. Class members got it, they're going to be able
8 to benefit from it. And, frankly, under some of the material
9 that was filed under seal, they're not just getting a repair of
10 the battery. Okay? They're getting even much, much better
11 than that.

12 I'm also a little concerned what happens if the Court
13 doesn't approve the settlement, from a policy point of view.
14 What does that mean? That means that any defendant now having
15 settled with plaintiffs in a consumer car case and having
16 achieved a settlement that includes a new warranty can't send
17 out a statement beforehand, has to get pre-approval of the
18 Court to send out an interim notice before there's notice; that
19 if you follow all the rule -- all the procedures that we set
20 forth in the Term Sheet, which we thought were fairly clear and
21 it was clear that it was all pursuant to the settlement,
22 somehow defendants would be handcuffed from entering into
23 warranties? It doesn't work that way. It's never worked that
24 way in the history of settling car cases. And the defendants
25 have presented the Court with a chart. It just simply doesn't

1 work that way.

2 THE COURT: But I'm not a rubber stamper either.
3 This whole thing is not a farce for you agree, I approve.

4 MR. LURIE: Of course not.

5 THE COURT: But on the one hand --

6 MR. LURIE: Of course not. But the -- the fact
7 is -- no, of course not, Your Honor. And the Court should be
8 absolutely convinced after reading all the papers that the
9 settlement is fair, adequate, and reasonable or it won't
10 approve it.

11 But the fact is that from -- just from a practical point
12 of view, having sent out an interim notification to consumers
13 about what they are going to get should not in and of itself
14 tank a settlement. It should not derail a settlement. And if
15 it does, then what we've essentially done is we've tied the
16 hands of counsel and parties in these cases whereby we say, You
17 know what? We have really great relief.

18 Look, I really believe that this was the best possible
19 relief we could have gotten in this case and we got it
20 absolutely the best way possible.

21 We knew -- we knew what needed to be done here and we did
22 it and we got it, and the defendants agreed that they would
23 even give it earlier than final approval. Should I -- I guess
24 I should apologize for not having done that. I just can't see
25 how that makes sense. I just can't see how that makes sense.

1 So now we've come to the Court at final approval and we're
2 faced with a really preposterous situation. We've settled the
3 case, we got great relief, they sent it out earlier, and now it
4 can't be approved because they did what they should have done.
5 I find that hard to believe.

6 And there may be some legal technicality, but that's not
7 even true either because the defendants have refuted that on a
8 legal basis. And we've demonstrated to the Court that final
9 approval of the settlement and final approval of something that
10 the defendants did voluntarily in the interim before final
11 approval has value. And the Court's signing and sealing it
12 means it can't be rescinded, modified, or withdrawn.

13 So from a policy perspective, I'm not even sure what we do
14 afterwards if this case is not approved. I just don't even
15 know how the parties would be able to settle these cases going
16 forward.

17 The final point that I would make, Your Honor, is with
18 respect to the valuation issue. This touches a little bit on
19 the fee. I don't know if I'm presumptuous about raising the
20 second motion because I don't know whether the Court wants to
21 hear argument on that.

22 THE COURT: Not yet.

23 MR. LURIE: But I would say with respect to the
24 valuation, because it did touch on -- it was mentioned in the
25 objection, it was touched on in defense counsel's papers --

1 argument.

2 The valuation in this case -- and again, this is important
3 because it touches on some of the confidential information that
4 was supplied. We did not feel that we needed -- well, let me
5 step back.

6 When we valued this case for -- for purposes of informing
7 the class what the value was, the \$11,000 benefit of the new
8 battery -- or replacement battery or a new battery, defendants
9 didn't want to tell us how much it cost. And, frankly, that
10 wasn't that important because we were able to find that
11 information from public sources.

12 Once we got it, we did get information from the defendants
13 about what the labor costs were. And we were able to crunch
14 the numbers. And this is an \$11,000 benefit per class member.
15 That's undeniable. It's an \$11,000 benefit.

16 Our expert was not trying to determine anything about the
17 technical requirements of the battery, how the battery worked.
18 As I argued earlier, that wasn't really the issue in our case
19 since they were given a new battery regardless of the reason,
20 regardless of the cost.

21 The expert calculated what the value of that battery is if
22 it has to be replaced because that was the information that we
23 could easily calculate. We had a number, and we gave it to the
24 Court. No matter how you slice it, though, whether you take
25 the most extreme number, which, you know, sounds juicy --

1 right? -- but it's a huge number, assuming every battery --
2 19,000 batteries were replaced, you get to \$200 million. Is it
3 possible? Sure, it's possible. Is it likely? I don't know.
4 Only the defendants would really know. After five years, we'll
5 know how many batteries were actually replaced.

6 But the reality is that even they agree it was at least a
7 \$10 million benefit. And our expert, even looking at hotter
8 climate states, as it turns out tends to be where a majority of
9 these batteries tend to be, is between 25 and \$40 million
10 benefit to the class.

11 So I'm proud of the valuation, and the valuation is
12 accurate. We don't have a -- and to be clear, the valuation
13 had to do with the benefit conferred. The valuation didn't
14 have to do with any technical -- any technical functioning of
15 the battery for reasons that we explained.

16 Just one final argument with respect to the Magnuson-Moss
17 Act or any other claim that could have been brought. My
18 understanding of the Magnuson-Moss Act claim is that it can be
19 resolved, no matter its merit, by simply repairing the product.

20 So even if we had prevailed on a Mag-Moss claim, which
21 apparently some objectors think would have carried the day
22 here, what would we have gotten in the end? We've got no
23 repair. We would have gotten a replacement. It's exactly what
24 we got. We just got it two or three years earlier.

25 So for all the reasons that we've already suggested,

1 Your Honor, we would ask the Court to approve the settlement as
2 fair, adequate, and reasonable.

3 If the Court has any additional questions after reading
4 the papers or now, we'd be happy to respond to them.

5 THE COURT: All right, folks. I'm going to go back
6 and review this. The matter will be submitted. You'll hear
7 from me. Thank you for your time, and I'll let you know if I
8 need further briefing.

9 We'll be in recess.

10 (Proceedings concluded at 11:30 a.m.)

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